

**Before the
Federal Communications Commission
Washington, D.C. 20553**

In the Matter of)	
)	
Creation of a Low Power Radio Service)	MM Docket No. 99-25
)	
)	

COMMENTS OF

THE NATIONAL LAWYERS GUILD,

COMMITTEE ON DEMOCRATIC COMMUNICATIONS

&

MEDIA ALLIANCE

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Executive Summary

This rulemaking marks an important step forward in the creation of new Low Power FM (LPFM) stations that will serve communities throughout the country. In this age of media consolidation, program homogenization, and lowest common denominator news, such original, local and diverse voices are necessary to sustain America's civic dialogue and engagement.

The low power radio movement has been at the core our work for over twenty years at the National Lawyer Guild's Committee on Democratic Communications ("CDC"). We provided legal assistance to some of the original micro radio broadcasters, who took to the airwaves to provide local voice and viewpoints on topics underrepresented by the mainstream media. Such expressions of the right to communicate offered an alternative to status quo, corporate radio content and challenged the Commission to make more efficient use of the spectrum and meet the demand for more original, community-based content.

We are pleased that the Commission is taking steps to implement the Local Community Radio Act (LCRA) and increase the number of local, independent voices on the dial. The LCRA charges the Commission with preserving spectrum for LPFM stations and ensuring that LPFMs and translator stations remain equal in status. Given this intent, and that currently there are far more translators than LPFMs, the Commission should prevent translators from foreclosing opportunities for LPFMs and provide licensing opportunities for LPFMs in as many communities as possible.

To accomplish these goals, we offer the following recommendations:

- Create an efficient second-adjacent wavier procedure, similar to the translator procedure
- Retain LP-10 and consider additional wattage levels between LP-10 and LP-100
- Grant LP-250 licenses to serve rural communities
- For mutually exclusive applications: (1) maintain or reduce two year community presence points; (2) adopt a local programming requirement; and (3) allow applicants to merge accumulated points before and after application deadlines
- Cross-ownership should be permitted on a limited basis
- Multiple ownership should be permitted for Native Nations
- Eliminate the burdensome intermediate frequency requirement from LPFM operating at 100 watts or less
- Increase efficiency of application review
- Create a future rulemaking to eliminate onerous transmitter certification requirement and replace it with the more economical transmitter verification requirement

We look forward to working with the Commission and new LPFM stations to create meaningful change on the dial and in local communities throughout the country.

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I. Interest of the Commentator

The National Lawyers Guild was founded in 1937 on the proposition that human rights are more important than property rights. Throughout its seventy-five year history, the Guild has worked with progressive human rights organizations and individuals throughout the world to ensure access to legal systems that serve and empower rather than impede and limit human rights.

The Committee on Democratic Communications (“CDC”) has been an important project of the National Lawyers Guild since 1985. The CDC is devoted to protecting the right of all people to a communication system based upon the principles of democracy and self-determination. The CDC supports independent media organizations, such as public access television, grass roots Internet resources, and low power radio, and it offers legal advice and representation to groups and individuals seeking to establish and sustain such forms of communication.

Media Alliance is a media resource and advocacy center for media workers, non-profit organizations, and social justice activists. The Alliance’s mission is excellence, ethics, diversity, and accountability in all aspects of the media in the interests of peace, justice, and social responsibility.

The low power radio movement has been at the core of our, and other media activist organizations’, work for over twenty years. In fact, LPFM would not exist today were it not for the original micro radio civil disobedience of Mbanna Kantako and Stephen Dunifer – efforts that helped shape the CDC and for which the CDC has provided legal assistance.¹

II. Introduction

We are pleased that the Commission is taking steps to implement the Local Community Radio Act – to limit the number of translator stations and ensure LPFM stations finally have the spectrum space and flexibility to serve major metropolitan areas of the United States. The LCRA takes an important step forward in removing the third adjacent channel spacing requirement, allowing LPFMs to exist two channels away from full power stations, just like translator stations.² The LCRA also expressly states LPFM must remain equal in status to translators.³ It is essential that the Commission fully implement that intent.

CDC, Media Alliance and others listed below believe that in this age of media consolidation and program homogenization, new diverse, local voices are necessary to sustain America’s civic dialogue and engagement. The expansion of LPFM opportunities means that many more new, local, and independent programmers will be heard on the radio, and they will reach more communities all over the country. This will strengthen both our democracy and our economy and will advance the FCC’s traditional goals of localism and diversity.

¹ See Appendix A, a brief history of the CDC’s involvement with the micro-radio movement.

² LCRA, § 3 at Pub. L. N. 111-371, 124 Stat. 4072 (2011).

³ LCRA, § 5.

To create meaningful change in the radio landscape however, the Commission must fully realize Congress' intent in the Local Community Radio Act ("LCRA) to ensure "availability of spectrum for low-power FM stations" and that LPFMs and translators "remain equal in status."⁴

III. Recommendations

Given the intent of the LCRA, and that currently there are many more translator stations than LPFMs, we agree with the FCC that it should prevent translators from foreclosing opportunities for LPFMs and provide licensing opportunities for LPFMs in as many communities as possible.⁵

We offer the following recommendations to realize these goals:

- Create an efficient second-adjacent waiver procedure, similar to the translator procedure
- Retain LP-10 and consider additional wattage levels between LP-10 and LP-100
- Grant LP-250 licenses to serve rural communities
- For mutually exclusive applications: (1) maintain or reduce two year community presence points; (2) adopt a local programming requirement; and (3) allow applicants to merge accumulated points before and after application deadlines
- Cross-ownership should be permitted on a limited basis
- Multiple ownership should be permitted for Native Nations
- Eliminate the burdensome intermediate frequency requirement from LPFM operating at 100 watts or less
- Increase efficiency of application review
- Create a future rulemaking to eliminate onerous transmitter certification requirement and replace it with the more economical transmitter verification process

a. Create an Efficient Second-Adjacent Waiver Procedure

In this notice, the Commission has eliminated the third-adjacent minimum distance separation requirement, allowing LPFMs to exist two channels away from full power stations, just like translator stations.⁶ Though the Commission does not expressly seek comment on the waiver process, we propose that the Commission adopt an efficient process through which an LPFM may attain a waiver similar to the translator waiver process.

b. LP-10 Should be Retained and Less Than 100 Watt LPFM Options Expanded

⁴ *Id.*

⁵ *Creation of a Low Power Radio Service, Amendment of Service and Eligibility Rules for FM Broadcast Translator Stations*, Fourth Report and Order and Third Order on Reconsideration, MM Docket 99-25, MB Docket No. 07-172, RM-11338, FCC 12-29, 3-4, ¶ 5 (rel. Mar. 19, 2012).

⁶ *Creation of a Low Power Radio Service*, Fifth Report and Order, Fourth Further Notice of Proposed Rulemaking, and Fourth Order on Reconsideration, MM Docket N. 99-25, FCC 12-28, 6-7, ¶ 10-11 (rel. Mar. 19, 2012) ("*Fifth Report and Order*").

The Commission seeks comment on whether to eliminate the 10-watt low power class of service (LP-10).⁷ We oppose this proposal and fully support retaining LP-10.

LPFMs should not be relegated to sparsely populated communities where radio spectrum is more abundant. Currently, in the top 50 markets there are 607 licensed FM translators and only 86 licensed LPFM's.⁸ This is not consistent with the LCRA's intent that LPFM stations are to be equal in status to translators.⁹ LPFMs should serve listeners wherever spectrum space can be found in both rural and urban areas.

We are reliably told that LP-10 presents the only viable LPFM option for the densest radio markets such as New York and Los Angeles. Further, LP-10 stations offer an especially good option for schools and libraries in urban areas.

But, in some cases, LP-10 will offer too weak a signal to make it a viable option for urban organizations that seek to serve listeners beyond a few city blocks. Section 5 of the LCRA charges the Commission "to ensure[ing] availability of spectrum for Low-Power FM Stations . . . based on the needs of the local community."¹⁰ It does not establish rigid wattage categories. Further, the Commission's longstanding license allocation policies under Section 307(b) of the Communications Act of 1934 as amended, directs the Commission to ensure "a fair, efficient, and equitable distribution of radio service" "among the several States and communities."¹¹

In light of this intent, we urge the Commission to adopt a more flexible licensing standard that would allow an applicant to receive, for example, an LP-10, LP-50, or LP-75 license based on the existing signal density of the area and the applicant's intended reach. Under such a framework, for example, the needs of a local high school to reach its one-square city block campus could be met through an LP-10 station, while the needs of a community development organization to serve its constituents within a square mile could be met through an LP-50 station.

Such a framework will allow more urban listeners to benefit from LPFMs and may reduce the number of MX (mutually exclusive) applications. This is consistent with the LCRA's intent to license new LPFMs based on the needs of the community, and the FCC's own charter to ensure the spectrum is operated in the public interest. Further, more efficient use of the spectrum will assist LPFMs in achieving parity with translators, consistent with the intent of the LCRA. Although ultimately there may still be fewer LPFM channels, given the more permissive translator licensing standards and the current deficit of urban LPFM channels, LPFMs will be able to serve more people if allowed to operate at 10 watts and other intervals between 10 watts and 100 watts, where spectrum space allows.

c. LP-250 Should be Implemented in Rural Areas

⁷ *Id.*

⁸ Michael Copps, Statement of Commissioner Michael J. Copps, MM Docket N. 99-25, FCC 11-105, July 7, 2011, available at http://hraunfoss.fcc.gov/edocs_public/Query.do?numberFld=11-105&numberFld2=&docket=&dateFld=&docTitleDesc=&Submit.x=55&Submit.y=12.

⁹ See LCRA, § 5.

¹⁰ *Id.*

¹¹ 47 U.S.C. § 307(b).

The Commission asks whether a 250-watt low power service (LP-250) should be implemented.¹² We support this proposal in so far as these stations serve rural, sparsely populated areas. We agree with the Commission's hypothesis that an increased LPFM power level could promote LPFM viability in rural areas by offsetting limited potential audiences.¹³

Further, to approve LP-250 would allow LPFM to achieve parity with translator stations, which already may operate with a maximum power of 250 watts ERP.¹⁴ Currently, translators can cover up to 5.5 times the area of an LPFM and have been allowed channel spacing much more liberal than low-power stations.¹⁵ To establish such equity is consistent with Congress' charge in the LCRA.¹⁶

The Commission also seeks comment on geographic restrictions for LP-250 stations.¹⁷ We agree there should be some threshold rules regarding signal strength and population density. We do not want LP-250 stations to for example crowd out LP-100 stations in the same market. We agree with the Commission's proposal that LP-250s "should not be permitted anywhere in the top 50 markets where . . . we [the Commission] believe[s] that licensing opportunities to be limited because of spectrum constraints and where there may be population centers outside core locations."¹⁸

d. Limited Revision of Mutual Exclusivity Competing Application Point System

i. Maintain or Reduce Two Year Community Purpose Points

The Commission seeks comment on whether to revise its definition of "established community presence" to require that an applicant have maintained such a presence for a longer period of time, such as four years, to earn a comparative point.¹⁹

We do not support an increase to the existing two-year standard. In fact, we urge the Commission to reduce it to one year, because some applicants have formed organizations for the sole purpose of operating a radio station and therefore may not have had a four-year existence within the community. Less time spent as an incorporated organization within a community does not necessarily mean an organization is less attuned to or representative of the community it seeks to serve. In fact, we have observed that some of the youngest organizations to apply and receive licenses are the best positioned to ultimately operate a station, as they have formed for the primary reason of operating an LPFM station and are not necessarily burdened by other program areas or organizational missions.

¹² *Fifth Report and Order* at 20, ¶ 49.

¹³ *Id.*

¹⁴ *Id.* at 20, ¶ 50.

¹⁵ Todd Urlick, FCC Finally Ready to Expand Low Power Radio After Fifteen Years, Common Frequency, April 2, 2012, available at <http://beta.commonfrequency.org/>.

¹⁶ See LCRA, § 5.

¹⁷ *Fifth Report and Order* at 21-22, ¶ 51.

¹⁸ *Fifth Report and Order* at 22, ¶ 51.

¹⁹ *Fifth Report and Order* at 25, ¶ 62.

In sum, we oppose this change as it sets too high a threshold to gain the comparative community purpose point and does not seem to be reasonably related to the intent of promoting community-based programming.

ii. Adopt a Local Programming Requirement

The Commission asks whether it should “impose a specific requirement that all new LPFM licenses provide locally-originated programming?”²⁰

We support this proposal. A local programming requirement will more effectively ensure that a station will serve its community than would an increase to the community presence standard. This requirement will help ensure that LPFMs indeed broadcast local content and will deter applications from organizations that seek a license simply to rebroadcast non-local material or material piped in by satellite.

iii. Allow Applicants to Merge Accumulated Points Before & After Application

The Commission seeks comment on whether applicants should be allowed to merge accumulated points prior to application submission.²¹

We support this proposal. We think that it will encourage more organizations to involve themselves from the beginning of the application process. We assume that many organizations will be more willing to sign on to the application of co-applicant at the beginning of the process and share the responsibility of operating a station rather than submit an application itself, knowing that it may ultimately have to operate a station on its own. The Commission’s proposal allows for risk mitigation and thereby may increase the number of viable applications. This rule change would also enable the Commission to frontload some of the application aggregation, which may ultimately save the Commission time when it reviews the list of mutually exclusive applications.

We do not propose that this new procedure however replace the existing procedure that allows applicants to merge points after applications have been submitted. We support both procedures, and we believe the combination of two will yield the strongest applicants and ultimately best LPFM stations.

e. Cross-Ownership Should be Permitted on Limited Basis

The Commission seeks comment on whether to revise its rules to permit cross-ownership of an LPFM station and an FM translator or translators.²²

We support limited cross-ownership. While we acknowledge that in some cases cross-ownership could enable LPFM stations to expand their listenership, there will be a negative

²⁰ *Fifth Report and Order* at 26, ¶ 63.

²¹ *Id.* at 27, ¶ 65.

²² *Id.* at 23, ¶ 56.

impact on localism the further a translator is geographically from the LPFM station and the community it primarily serves. Therefore, the Commission should establish a fixed physical limit governing the distance between the LPFM station and translator, beyond which cross-ownership is not allowed.

We propose that a translator and LPFM station may be owned by the same entity if the following conditions are met: (1) the translator only carries the LPFM signal; (2) and the translator is close enough to the LPFM station that it is within the primary contour of the LPFM station (though, we would support an exception where terrain blocks the LPFM's signal in what would otherwise be its primary contour); (3) the LPFM owner may only own one translator station; and (4) the translator owned by the LPFM owner may not receive their signals via satellite.

f. Multiple Ownership Should be Permitted for Native Nations

The Commission seeks comment on whether Native Nations should be permitted within their territory to engage in "multiple ownership," meaning Native Nations could own more than one LPFM station permit within their tribal lands.²³

We agree with the Commission's proposal. The situation facing Native American rural areas is very different than facing the top markets, which is where most of our concerns exist. Native Nations are presented with the unique dilemma of seeking to serve a large, often irregularly shaped rural area in which there may be few other organization in addition to the tribal members eligible to apply for an LPFM application. Given these challenges, this proposal may assist Native Nations in better serving their communities.

g. The Intermediate Frequency Separation Requirement Should be Eliminated for LPM Stations Operating at 100 Watts or Less

The Commission seeks comment on whether it should exempt LPFM stations from intermediate frequency separation requirements.²⁴ Under the existing rules, LPFM stations are required to protect full-service stations on their intermediate frequencies ("I.F."), while translator stations operating with less than 100 watts ERP are not.

In light of this inequity, and in consideration of the additional burden the I.F. separation requirement places on LPFMs, we agree with the Commission that it should eliminate this requirement for LP-10. However, we propose that the Commission should also eliminate this requirement for LP-100. As the Commission acknowledges, FM translators operating with less than 100 watts ERP are exempt from the I.F. protection requirements.²⁵ The Commission should change this language for LPFMs from "less than 100 watts" to "100 watts or less," given that very few LPFM's (only LP-10) would otherwise benefit from this exemption.

h. Request to Increase Efficiency of Application Review

²³ *Id.* at 23, ¶ 58.

²⁴ *Id.* at 21, ¶ 52.

²⁵ *Id.* at 21, ¶ 52.

The last round of LPFM licensing review took the Commission an exceedingly long time. It took the Commission two years to review the applications prior to issuing the list of mutually exclusive applications. Such delay can slow the momentum of would-be broadcasters from taking to the airwaves and can cause funding and budgeting difficulties. We urge the Commission to use modern technology and find ways to expeditiously process these applications and provide periodic public updates about its progress.

i. Proposed Future Rulemaking to Eliminate Onerous Transmitter Certification Requirement

Finally, we urge the Commission to consider in a future rulemaking the elimination of the onerous transmitter verification requirement for LPFM stations. The Commission's current LPFM rules require LPFM stations to utilize transmitters which have been *type certified* by an outside testing lab that then submits the results to the Commission's Office of Engineering and Technology,²⁶ while full power NCE stations need only be *type verified*, which allows the manufacturer to use the cheaper, simpler, self-approval procedure. We believe the requirement should be the same for both classes of stations. The intent was to prevent the use of transmitters with excessive bandwidth or modulation, excessive power output, or insufficient frequency stability, which could cause interference to other existing station. However, there is no scientific or technical evidence that LPFM transmitters have exhibited that such technical irregularities are different or beyond those experienced by full power NCE transmitters, which require only *type verification*.

The FCC has made the LPFM community require a more stringent requirement for FCC transmitter use. To obtain such certification for a transmitter is onerous and costly. Further, we do not believe that it is financially prudent to spend time and resources on certifying FM transmitters for such a small niche. In sum, we see no reason to attach this additional burden to LPFM stations or the Commission and support a separate rulemaking to eliminate this requirement.

IV. Conclusion

We are pleased that the Commission is taking steps to implement the Local Community Radio Act (LCRA) and increase the number of local, independent voices on the dial. We urge the Commission to implement our recommendations in order to serve the intent of the LCRA to prevent translators from foreclosing opportunities for LPFMs and provide licensing opportunities for LPFMs in as many communities as possible. We look forward to working with the

²⁶ Type certification is always performed by an outside testing lab which submits the results and application forms to the FCC's technology office <http://transition.fcc.gov/oet/ea/Welcome.html>. Average cost is around \$5000 to \$7000. Sometimes higher, especially if retesting is required. We seek to change one word, from certified to verified. See 47 CFR § 73.1660(a)(1), (2) available at <http://www.gpo.gov/fdsys/pkg/CFR-2009-title47-vol4/xml/CFR-2009-title47-vol4-part73.xml#seqnum73.1660> "An AM, FM, or TV transmitter shall be verified for compliance with the requirements of this part following the procedures described in part 2 of this chapter." "An LPFM transmitter shall be certified for compliance with the requirements of this part following the procedures described in part 2 of this chapter."

Commission and new LPFM stations to create meaningful change on the dial and in local communities throughout the country.

APPENDIX A

Brief History of the CDC's Involvement with Micro-Radio

In the 1980's, Mbanna Kantako, a blind, unemployed black man and something of a community organizer, operated a one-watt FM, unlicensed station that could be received over a one-mile radius and covered the entire Springfield Illinois housing project in which he (and most of the black population of Springfield, which was not served by any other stations in the area) lived. The little station broadcasted rap music and commentary for two years, until Kantako put some young folks on the air to share their story of being beaten by the housing authority police. Two days later, the police and FCC arrived and informed Kantako to cease broadcasting because he did not have a license. Kantako refused to stop broadcasting. He concluded that the airways belong to the people, and not the government, and continued to broadcast.

Through a friend who taught at the local university Kantako reached out to the Lawyers Guild for help.

In response, the CDC conducted extensive research on the validity of the FCC's refusal to consider license applications for less than 100 watts and wrote a hundred-plus page brief on the issue. Soon after, the CDC's work was put to use in defending a Berkeley, CA unlicensed micro radio broadcaster named Stephen Dunifer against the FCC. Dunifer began unlicensed broadcasting on a 10-watt transmitter atop the Berkeley, CA hills to provide an independent account of the U.S. involvement in the first Gulf War.

When the FCC went to court seeing an injunction to stop Dunifer's broadcasts CDC filed its brief and CDC members represented Dunifer. The district court judge refused the government's motion for an injunction, finding in her order that there were important First Amendment issues raised by the case and sent it back to the FCC for further consideration

The initial victory in support of Dunifer's act of civil disobedience legitimized the micro radio movement. It emboldened those willing to broadcast without a license. These broadcasters cited the Dunifer ruling as evidence that the FCC's ban on low power radio violated the constitution. The legal victory,²⁷ combined with new, cheap broadcasting equipment and the increasing discontent with commercial media, triggered an unlicensed radio movement that peaked in the late 1990's with probably a thousand unlicensed low powered stations on the air.

The Commission tried to shut these stations down but ran into resistance from the broadcast centers' allies. CDC functioned as a litigation resource for low power unlicensed broadcasters. The CDC helped them find local counsel and provided legal resources and advice. Then FCC chairman, Bill Kennard, appeared to conclude that the movement could not be squashed and initiated a rulemaking proceeding to create a new class of low power radio stations (LPFM). CDC suddenly was receiving calls from the Office of the Chairman of the FCC, and ultimately actively participated in the rulemaking process that led to the FCC's legitimating of low power radio.

Following this period, the CDC along with the Alliance for Community radio and Prometheus Radio Project assisted LPFM applicants in understanding and complying with the

new FCC rules. We now seek to ensure that in this new round of licensing the maximum number of truly local organizations can receive LPFM licenses